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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-74

ALLEN CONQUE,

Petitioner,

VS.

HAROLD GAUTHE, ET AL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents pray that this Court deny the petition for certiorari sought by petitioner to review the decision of the United States Court of Appeals for the Fifth Circuit rendered March 14, 1975, affirming the judgment of the United States District Court for the Western District of Louisiana, Lafayette Division, issued August 21, 1974.

QUESTION PRESENTED

I.

Whether under the circumstances of this case

both courts below were correct in sustaining the local school board in relieving petitioner of his extra curricular coaching activities while not disturbing him in his professional position of a teacher of General Science.

STATUTE INVOLVED

The pertinent provision of the Louisiana Teacher Tenure Law (LRS 17:441-444) which is set forth hereinafter as Exhibit A, page 27.)

STATEMENT OF THE CASE

Allen G. Conque, petitioner herein, is a white teacher in the Lafayette Parish School System. He is certified in his teaching profession by the Louisiana State Department of Education as a teacher of General Science. He was employed by the Lafayette Parish School Board as a teacher of General Science at Carencro High School in the Lafayette Parish School System. Petitioner was permitted to assume extra-curricular duties as an assistant coach for which he was paid extra remuneration. As a certified teacher of General Science, a position which requires a teacher's certificate, petitioner meets the definition of a "teacher" as set forth in Section 441 of the Louisiana Teacher Tenure Law (LRS 17:441-444) and has acquired tenure in his position as General Science teacher under that law. The school board has not attempted in any manner whatsoever to dismiss or demote petitioner as a teacher of General Science and Mr. Conque is, this very day, serving as teacher of General Science at Carencro High School with the same salary, rights, and emoluments

of any other teacher in the Lafayette Parish School System.

Mr. Conque was only relieved of his extra-curricular duties as an assistant coach which duties or position do not require a teacher's certificate and for which duties Mr. Conque does not possess a teacher's certificate. Consequently, Mr. Conque's duties as an assistant coach are not covered by Louisiana's Teacher Tenure Law. The Attorney General of the State of Louisiana has consistently so held since 1954. (See Opinions of Louisiana Attorney General attached hereto as Exhibit B, pages 28-30.)

Mr. Conque was one of several assistant coaches at Carencro High School. At some point, problems began to develop in the athletic program at the high school particularly with relation to the coaches. The principal of the school, Mr. Dugas, in exercising the necessary judgment and responsibility of his position as chief administrator of the school concluded that the problem was due primarily to the attitude of Mr. Conque. In carrying out his responsibility as principal, he advised the superintendent of the problem and his judgment as to the cause of this problem.

The superintendent, Mr. Gauthe, then had several discussions of the situation with both Mr. Dugas, Mr. Conque and with the other coaches. However, the situation continued to deteriorate and finally resulted in the superintendent calling a meeting at the school on February 21, 1972, to discuss these problems with such meeting being attended by the superintendent, Principal Dugas, Mr. Conque, other coaches and several

School Board members. At that meeting it was determined that no coaching changes would be made at that time but if the situation did not improve the principal and the superintendent would make such recommendations as were necessary to correct the situation.

The situation did not improve and on June 6, 1972, Principal Dugas wrote the superintendent recommending that Mr. Conque be transferred to another position in the Lafayette Parish Schools. Thereafter, the superintendent held several hearings with Mr. Conque and Principal Dugas in an attempt to resolve the unsatisfactory coaching and athletic situation at Carencro High. However, the situation continued to deteriorate and on June 1, 1973, Principal Dugas again wrote the superintendent requesting that Mr. Conque be transferred. That letter is the letter complained of by petitioner although that letter was never presented to the School Board, was only a departmental memorandum from the Principal to the Superintendent and was made public only by petitioner's action.

Thereafter, Superintendent Gauthe again discussed the situation with Mr. Conque at a hearing in his office but finally decided that it would be in the best interest of the school system and the coaching and athletic situation at Carencro High School that Mr. Conque be transferred and relieved of his extracurricular coaching duties. Consequently, on June 22, 1973, the superintendent notified Mr. Conque by letter that based on the recommendations of the principal and ". . . my review of the testimony brought out at several hearings . . ." that he was relieved of his duties

as an assistant coach though remaining as a teacher of General Science at Carencro High School. A copy of this letter, only, was sent to the members of the Lafayette Parish School Board for their consideration in connection with the personnel changes to be presented to the School Board at its meeting of July 18, 1973.

The total list of personnel changes considered by the School Board at its meeting of July 18, 1973, was approximately eight (8) pages long and Mr. Conque's name appears on that list along with 17 other teachers who are also listed under "TRANSFERS: (Eff. Begin. 1973-74 session)". Mr. Conque is shown on that list as being transferred from General Science teacher and assistant coach at Carencro High to General Science teacher at Carencro High. At least one other person on that list of transfers was also relieved of his extracurricular coaching activities by a similar transfer. That transfer list also transferred John George Hutchinson from teacher of Business Education and assistant coach at Lafayette High School to teacher of Distributive Education at the Vocational Center.

When the list of personnel changes, including Superintendent Gauthe's recommendation with respect to Mr. Conque, was presented to the Lafayette Parish School Board at its meeting of July 18, 1973, Mr. Conque, together with a group of his supporters, attended the meeting and were heard in opposition to Superintendent Gauthe's recommendation. After hearing from Superintendent Gauthe in support of his recommendation and Mr. Conque's opposition thereto, a motion was made and seconded to approve Superin-

tendent Gauthe's recommendation. At that time one school board member, Mr. Babineaux, inquired of Mr. Conque if he wanted a formal hearing at which his dismissal as a teacher in the system could be considered by the Board. When Mr. Conque replied in the affirmative, Mr. Babineaux made a substitute motion that a formal tenure hearing be scheduled to consider Mr. Conque's dismissal as a teacher in the Lafayette Parish School System. This motion died for a lack of a second and the original motion to approve the superintendent's recommendation was then passed by a vote of 12 to 1 with one member absent. (See affidavits of Superintendent Gauthe and Lafayette Parish School Board members filed in support of defendents Motion for Summary Judgment attached hereto as Exhibit C pages 31-41.)

Thereafter, on February 11, 1974, plaintiff filed his complaint against Superintendent Gauthe, Principal Dugas, and the individual members of the School Board. The Lafayette Parish School Board, the political subdivision and body politic of the State of Louisiana, which has sole authority for dismissal, etcetera, of personnel in its school system was not named as a defendent.

Plaintiff's complaint, among other things, requested that a statutory three judge court be convened to consider the unconstitutionality of the Louisiana Teacher Tenure Law. On February 12, 1974, the District Court issued an order requiring both parties to file briefs within 30 days on the question of whether

or not any substantial constitutional questions were presented by the complaint such as to require the convening of a three judge court. Briefs were filed as directed, and on March 27, 1974, defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted, for lack of jurisdiction, and for want of a substantial Federal question. On May 1, 1974, plaintiff Conque filed a motion for summary judgment supported only by his own affidavit. After a hearing, on May 23, 1974, the District Court issued a ruling on the pending motions denying defendant's motion to dismiss for failure to state a claim and reserving judgment on plaintiff's motion for summary judgment. On June 17, 1974, defendants filed an opposition to plaintiff's motion for summary judgment and a motion of their own for summary judgment supported by the affidavits of the superintendent and all members of the School Board with certain exhibits, including the minutes of the July 18, 1973, Board meeting, attached to those affidavits. On July 12, 1974, plaintiff again filed his own affidavit as a counter-affidavit to defendant's motion for summary judgment. On July 30, 1974, plaintiff filed a motion to strike defendants affidavits. On August 21, 1974, after a further hearing, the District Court rendered judgment denying plaintiff's motion for summary judgment, granting defendant's motion for summary judgment, and dismissing plaintiff's suit. (Petition for Certiorari, pgs. 3a-7a). On August 30, 1974, plaintiff noticed his appeal to the Court of Appeals for the Fifth Circuit. On March 14, 1975, the Court of Appeals

rendered its decision affirming the District Court. (Petition for Certiorari pgs. 1a-2a).

REASONS FOR DENYING THE WRIT

I. There is no substantial Federal question.

This is a suit by one citizen of Louisiana against several other citizens of Louisiana. There is no diversity of citizenship. The requisite jurisdictional amount is not present.

The petitioner is a white teacher-employee of the Lafayette Parish School Board and there are no allegations or issues of discrimination because of race, color, creed, sex, or national origin and the District Court so held. (See District Court Judgment Petition for Certiorari page 6a).

Petitioner's professional status as a teacher of General Science, his field of professional certification, has not been disturbed. He is still, to this very day, employed as a teacher of General Science at Carencro High School in the Lafayette Parish School System with the same salary, rights, and emoluments of any other teacher in the Lafayette Parish School System. Petitioner has only had his duties reassigned so as to relieve him of the extra-curricular activities he was performing on a voluntary basis as assistant coach. No teacher can be compelled to assume any coaching duties whatsoever.

Although the petition for certiorari does not set forth specific reasons why this court should grant certiorari, its only basis appears to be that petitioner

was reassigned and relieved of such extra-curricular duties without due process in violation of the Fourteenth Amendment to the United States Constitution.

Although it is extremely doubtful that the due process clause of the Fourteenth Amendment of the United States Constitution applies to petitioner in these circumstances, and petitioner cites no case which so holds, it is very clear that petitioner had the benefit of due process throughout. He was counseled with, and heard, repeatedly by both his immediate superior, the principal of Carencro High School, and the Superintendent of Schools for Lafayette Parish over a period of approximately two years as to the deficiencies in his performance as an assistant coach at Carencro High School. Furthermore, it is also clear that the action of the School Board in approving Superintendent Gauthe's recommendation relative to petitioner was not based on the letter of June 1, 1973, from Principal Dugas to Superintendent Gauthe and complained of by petitioner, as such letter was never made available to members of the School Board. Instead, it is clear that the action of the Board approving Superintendent Gauthe's recommendation relative to petitioner was based upon (1) their own personal knowledge of the situation at Carencro High and/or (2) Superintendent Gauthe's letter of recommendation of June 22, 1973.

In addition, it is also clear that petitioner Conque and his supporters appeared, and were heard, in opposition to Superintendent Gauthe's recommendation at the School Board meeting of July 18, 1973, prior to

the Board's final approval of the Superintendent's recommendation.

We respectfully submit that under the above circumstances there is serious doubt that a sufficiently substantial Federal question existed for jurisdictional purposes in the District court. Certainly, it would not appear to present a question of a magnitude to justify this court's exercise of its supervisory jurisdiction.

II. With Respect to the Right and Authority of a Local School Board to Properly Administer It's School System and the Rights of Educators in the Teaching Profession, the Decisions Below Are Consistent with the Decisions of this Court, Other Decisions of the United States Court of Appeals for the Fifth Circuit, and Do Not Conflict With Decisions of Other Circuits.

The decisions below are consistent with this court's decisions in *Board of Regents* vs. *Roth*, 1972, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548, and *Perry* v. *Sindermann*, 1972, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d and the principles established in the other decisions of this court cited by petitioner. *Roth* and *Sindermann* both involved the question of whether and under what circumstances a university professor has a "property interest" in re-employment or is deprived of "liberty" so as to require a due process hearing before dismissal. Since Mr. Conque has not been dismissed or otherwise disturbed in his professional position of teacher of General Science, it is doubtful if these decisions, or any other of this court's decisions cited by petitioner is even applicable. However, if they are applicable they are entirely consistent with the

decision of the courts below as the District Court clearly found that Mr. Conque did not have the necessary "property interest" as his extra-curricular coaching activities did not fall within the purvue of the Louisiana Teacher Tenure Law and he had not been dismisses or demoted from his professional position of Teacher of General Science at Carencro High School. The District Court also found that he had not been deprived of "liberty" because the action of the Superintendent and School Board of transferring Mr. Conque and relieving him of his extra-curricular coaching duties was not based upon the alleged defamatory letter of June 1, 1973, from Principal Dugas to Superintendent Gauthe but was based solely on a combination of personal knowledge of the situation and Superintendent Gauthe's letter of recommendation to the Board of June 22, 1973. It is even extremely doubtful that the content of the letter from Principal Dugas to Superintendent Gauthe of which petitioner complains is such as would label Mr. Conque with a "badge of disgrace" even if that letter had been the basis for the School Board's action. That this is not the case here, as pointed out by the District Court, is shown by the fact that Mr. Conque is, to this day, retained as a teacher of General Science at Carencro High School in his field of professional certification. (District Court judgment, petition for certiorari, pages 6a and 7a).

Furthermore, Mr. Conque's position gains no strength from the other decisions of this court cited

in his petition. Respondents have no quarrel with the principals established by those cases or with the language quoted from those decisions and the decisions of the court below are entirely consistent with those decisions. They are simply not applicable under the circumstances of this case. For example, can there be any doubt whatsoever that Mr. Conque received far more in the way of due process than that suggested by this court in *Goss* vs. *Lopez*, U.S. , 42 L. Ed. 2d 725, 95 S. Ct. 729? Over a period of one and one half (1½) years Mr. Conque had the benefit of many conferences and hearings with both Principal Dugas and Superintendent Gauthe as well as some members of the School Board. He was sent a copy of Superintendent Gauthe's recommendation to the School Board and appeared and was heard at the School Board meeting at which the Board acted on Superintendent's recommendation.

Plaintiff also attempts to assert a lack of due process by alleging that the one letter of June 1, 1973, from Principal Dugas to Superintendent Gauthe was the sole basis for the Board's relieving him of his coaching duties and that such letter contained "... scandalous and defamatory false allegations damaging of your complaintants reputation as a person and as a member of the teaching profession ..." He then asks relief under the principles stated by this Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 and *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed. 2d 515; and the decision of the Eighth Circuit Court of Appeals in *Wilderman*

v. Nelson, 467 F.2d 1173 contending that he was entitled to, and did not receive, a formal due process hearing. Once again, defendants do not disagree with the principles set forth in those cases and quoted by petitioner. However, once again we respectfully submit that plaintiff's contention misses the mark and that those principles are not applicable to the facts here.

In the first place, as the Court below found, the statements contained in the June 1, 1973, interdepartmental letter from Principal Dugas to Superintendent Gauthe did not go so far. In the second place, the affidavits of the members of the School Board and Superintendent Gauthe indicate clearly that this letter was not the basis of their relieving him of his coaching duties but that such decision was, instead, based upon the recommendation of Superintendent Gauthe as contained in his letter of June 22, 1973, and their, and Superintendent Gauthe's, own personal knowledge of the situation at Carencro High. (As a matter of fact, the June 1, 1973, letter of Principal Dugas to Superintendent Gauthe was never given to the members of the School Board and was not made public in any way until the plaintiff himself made it public). In addition, there is nothing in the public records or minutes of the School Board which could stigmatize Mr. Conque so as to foreclose future opportunities to practice his chosen profession of teaching. Moreover, in *Wilderman* the employee had been fired from his "chosen profession" while here as noted by the District Court, Mr.

Conque is still practicing his chosen profession of teaching as a teacher of General Science in the Lafayette Parish School System.

In *Wisconsin v. Constantineau*, supra, the posting process by State officials under the Wisconsin statute virtually labeled a person as a dangerous drunkard before the entire community and is certainly inapplicable to the facts here.

This Court's decision in *Roth* not only does not support plaintiff's position but actually supports defendant's position. In that case this Court affirmed the dismissal of a university professor without a full due process hearing. In affirming the dismissal of the university professor without a hearing, the Court said at 92 S.Ct. 2707:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality..."

This is exactly the case here. The State (here the political entity, the Lafayette Parish School Board) did not make any charge against him that might seriously damage his standing and associations in his community. It did not base relieving him of his coaching duties on a charge that he had been guilty of dishonesty or immorality. The only thing that shows in the minutes of the school board meeting of July 18, 1973,

where the School Board acted, is shown at pages 64 and 65 of the Appendix,

> "*TRANSFERS*: (Eff. begin. 1973-74 Session)
> ...
>
> | | |
> |---|---|
> | CONQUE, George Allen | From Head Track Coach/ Asst. Coach/General Science to General Science-Carencro High |

Mr. Conque was merely listed as one of eighteen teachers who were being reassigned. On that same list, the very first teacher listed was also being relieved of his coaching duties, in the same manner as Mr. Conque, as follows:

> "*TRANSFERS*: (Eff. begin. 1973-74 Session)
>
> | | |
> |---|---|
> | HUTCHINSON, John George (Eff. 1973-74 Session) | From Business Educ/Asst. Coach-Lafayette High to Distributive Educ-Vocational Center) |

The only other reference to Mr. Conque that is found in the minutes of that Board meeting is found in the Appendix at page 80 as follows:

> "PERSONNEL CHANGES:
>
> Mr. Gauthe presented the list of personnel changes to the Board. He informed the Board of the following changes:
>
> (INSERT LIST HERE)
>
> After a discussion on the transfer of Mr. G. Allen Conque from Head Track Coach, Assistant Coach and General Science teacher to the General

Science teacher at the Carencro High School, it was moved by Mr. Babin, seconded by Mr. Bourque that the recommended personnel changes be approved by the Board.

A substitute motion was made by Mr. Babineaux that the Board grant a hearing to Mr. Conque. Due to a lack of a second, the substitute motion died on the floor.

Original motion carried. Mr. P. Babineaux requested that he be recorded as voting No."

Therefore, again as this Court said in *Roth* in affirming the *dismissal* of a university professor without a due process hearing (Mr. Conque was only relieved of his coaching duties),

> ". . . in the present case, however, there is no suggestion whatever that the respondent's good name, reputation, honor, or integrity is at stake."

We would further respectfully submit, in any event, that here Mr. Conque was given all procedural due process necessary under the Constitution. Certainly, over the two year period Mr. Conque knew what the complaints were and who was complaining. The letter of June 22, 1973, from Superintendent Gauthe to Mr. Conque is certainly clear and there can be no doubt that he was given an opportunity to be heard by the Board before it acted.

Plaintiff also complains of having been denied equal protection of the law under the constitution, relying on the statements of principle contained in such cases as *State of Missouri Ex Rel Gaines v. Canada,*

et al, (1938) 59 S.Ct. 232, 305 U.S. 337; *Yick Wo v. Hopkins,* 118 U.S. 346, 6 S.Ct. 1064, 30 L.Ed. 220, and *Skinner v. State of Oklahoma,* (1942) 62 S.Ct. 1110, 316 U.S. 535, to support such contention. Again, defendants do not disagree with the statements of principles of any of those cases but we respectfully submit that statements of principle such as plaintiff quotes from *Skinner,* that:

> ". . . when the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." (Pet. for Cert., p. 29)

are simply not applicable to the facts in this case. Plaintiff has not been given unequal treatment. He has been given the same, or better treatment, than any one else in the school system. In his chosen profession of teaching in his field of certification he is still, today, a teacher of General Science at Carencro High School receiving the same salary, emoluments and other benefits as any other teacher in the Lafayette Parish School System.

Respondents would respectfully submit that under the circumstances of this case, the decisions of the courts below are not only consistent with the cases cited by petitioner, but clearly fall within the ambit of other decisions of the Fifth Circuit such as *Cole* v. *Union Parish School Board,* 1974, 498 Federal 2d 910, rehearing denied 503 Fed. 2d 567 affirming the dismissal of a black probationary teacher upon the writ-

ten recommendation of the Superintendent accompanied by valid reasons, but without a hearing, in accordance with the probationary section of the Louisiana Teacher Tenure Law (L.R.S. 17:442) and in spite of allegations by the teacher that his dismissal was racially motivated; *Robinson* v. *Jefferson County Board of Education, et al*, 1973, 485 Fed. 2d 1381, rehearing denied 488 Fed 2d 1055 affirming the dismissal, without a hearing, of a probationary teacher under Alabama's Teacher Tenure Law in spite of contentions by the teacher that she was being dismissed for exercising her first amendment Constitutional Rights and was denied due process; *Markwell* v. *Culwell*, 1975, 515 Fed 2d 1258 affirming the dismissal of a probationary college teacher without a hearing in spite of allegations that his dismissal was due to his exercise of allegedly protected first amendment rights; *Bradford* v. *Tarrant County Junior College District*, 1974, 492 Fed. 2d 133, rehearing denied May 8, 1974, confirming the dismissal of a non-tenured junior college teacher without a hearing in spite of allegations that the dismissal was based upon her exercise of first amendment rights. See also, *Sims* v. *Fox*, 1974, 505 Fed 2d 857, and *Kaprelian* v. *Texas Woman's University*, 1975, 509 Fed. 2d 133.

In *Cole* there were allegations of Constitutionally impermissable racial discrimination which do not exist in this case. Also, Mr. Cole was being dismissed from his professional position as a teacher, a position covered by the Louisiana Teacher Tenure Law, which also is not the case here. In *Robinson* also the teacher

was dismissed from a position covered by the Alabama Tenure Law in spite of her allegations that her dismissal was because of her exercise of protected First Amendment Rights. In addition, the stated public reasons given by the School Board for her dismissal were (1) inefficiency and incompetency as a teacher, (2) use of profanity in the classroom, and (3) inability to relate to ninth grade students. Certainly that teacher was in a stronger position than Mr. Conque whose duties as an assistant coach do not come within the Louisiana Teacher Tenure Law, who does not allege that the Board's action was racially motivated or based upon his exercise of other constitutionally protected rights, where the School Board's public records and action only reflect that he was transferred from the position of General Science teacher and assistant coach at Carencro High School to General Science teacher at Carencro High and he is still teaching in his chosen field of professional certification. The case at bar would also seem to be on virtually all fours with *Bradford*, supra, involving the dismissal of a non-tenured college teacher although in that case the teacher had also contended that she was dismissed because of her exercise of her First Amendment Right of free speech.

Sims and *Kaprelian*, supra, each contain extensive discussion of the law as it applies to "property interest" and "liberty interest" claims which are necessary to activitate constitutional due process requirements in these type cases. In *Sims* the Court of Appeals, en banc, reversed its original panel decisions

(492 F.2d 1088) holding finally that an Air Force Lieutenant's "expectation of a full tour of duty" did not give him a sufficient "property interest" to invoke constitutional due process requirements and that his discharge for indecent exposure which might be reflected from his discharge was not so "stigmatizing" as to deprive him of a "liberty interest" sufficient to invoke such constitutional due process. Certainly, petitioner here, still employed as a teacher in his chosen profession in his field of professional certification, has no "property" interest at stake comparable to dismissal from the United States Air Force. Certainly, he has not been "stigmatized" by any public charges even slightly comparable to the sexual offense of indecent exposure to children.

In *Kaprelian*, supra, the Court of Appeals affirmed the District Court's finding that the professor had no form of tenure and hence, no "property interest" but disagreed with the District Court's conclusion that the mere allegations of her complaint that she was dismissed because of her exercise of First Amendment rights were sufficient to establish a "liberty interest" which would invoke constitutional due process requirements and remanded on that issue.

In *Kaprelian*, the Court of Appeals thoroughly and succintly discusses the principals of constitutional due process requirements in teacher dismissal cases as established by present jurisprudence. At page 139 the court discusses "property interest" saying:

"...it is now familiar law that non-tenure teachers such as Dr. Kaprelian may be discharged for no

reason or for any reason not impermissable in itself or as applied...."

Again, at page 137, the Court of Appeals discusses "liberty interest" as follows:

> "... A liberty interest arises, for example, when *one is publicly subjected to a badge of infamy, such as being "posted" as a drunkard.* In plaintiff's context, it arises when an employee is able to demonstrate that *the State has made a charge* "that might seriously damage his standing and associations in his community" or that is of such a nature as to impose "a stigma or other disability that *foreclosed his freedom to take advantage of other employment opportunities.*" Such a showing is the employee's voucher of admission to the arena of procedural due process; *without it such questions do not arise.* Moreover to raise a liberty interest *such charges must be public ones*; we have recently held that even charges of the most damaging nature do not do so by their mere presence in confidential files...." (Emphasis added) (citation omitted)

The court then, due to the First Amendment rights issue, remanded to the District Court with the following directions:

> "... On the remand which we order, the Court should determine the following:
>
> (1) Was Dr. Kaprelian discharged for exercising First Amendment rights?
>
> (2) Were the charges made stigmatizing, in their context, and
>
> (3) If so, has the administration of the insti-

tution made these charges public in any official or intentional manner, other than in connection with the defense of this action?

If the court finds in the affirmative as to (1) or as to (2) and (3), it should remand the matter to the institution for an administrative hearing on the merits of the charges, as well as upon the question, should the court have found in the affirmative on (1), whether Kaprelian's ". . . exercise of [her] constitutional privileges clearly overbalanced [her] usefulness as an instructor." *Ferguson*, 430 F. 2d at 859. *If not, it should enter judgment for defendants.* (Emphasis added)...."

There can be no doubt under the circumstances of the instant case that the above three questions must be answered in the negative and that judgment should be entered for respondents.

III. The Decisions Below Are in Accord With The Law and Policy of the State of Louisiana.

Petitioner cites two Louisiana cases, State, ex rel, *McNeal* vs. *Avoyelles Parish School Board* 199 La. 859, So.2d 165 (1942) and *Aswell* vs. *Jackson Parish School Board*, 176 So. 2d 741 (1965) for the proposition that he is being denied equal protection of the laws and being treated differently from other teachers in Louisiana in violation of the Louisiana Teacher Tenure Law. Once again, the decisions cited are simply not applicable to the facts of this case.

In *McNeal*, the School Board had admittedly demoted McNeal from the position of principal (a position which required a teacher's certificate) back to the

lesser position of classroom teacher, with the corresponding reducation in salary and status, without the due process hearing required by the Louisiana Teacher Tenure Law for tenured teachers. There was no dispute as to McNeal and his position as principal being covered by the Tenure Law. The only question was whether a demotion as compared to an outright dismissal came within the language of the Tenure Statute prohibiting "removal from office" and the Louisiana Supreme Court properly held that it did. In the *Aswell* case, simllarly, the only issue was whether removing a teacher from the position of Principal where he had tenure to another position for which he was not qualified and could not attain tenure without going back to school was a demotion and the Court again properly held that it was.

In the instant case, however, the Louisiana Teacher Tenure Law is not even involved as was found by the District Court in its initial ruling on May 23, 1974, holding that the convening of a statutory three judge court to determine the constitutionality of the Louisiana Teacher Tenure Law was unnecessary. In so holding, the District Court said:

". . . Conque admits in brief (p. 2) that he did not acquire tenure in the position from which he was removed. This is true. The term "teacher" as used in the tenure law is defined as follows:

'As used in this sub-part, the word "teacher" means any employee of any parish or city school board who holds a teacher's certificate and whose legal employment requires such teacher's certificate.' (L.S.A.-R.S. 17:441)

> There is no requirement that a coach hold a teacher's certificate disclosed by our independent research, and plaintiff cites no statute, regulation or express policy requiring that persons so employed be certificated."

This finding and conclusion of the District Court is further supported by the opinions of the Attorney General of Louisiana attached hereto as Exhibit B, pages 28-30.

Respondents respectfully submit that the circumstances of this case when compared to the facts and circumstances of all applicable decisions of this court and the courts of appeal make it abundantly clear that petitioner who is still, to this day, employed in the Lafayette school system as a teacher of General Science in his field of professional certification has not been deprived of any "property" interest nor has he been publicly stigmatized by any action by the School Board or its administration which has deprived him of a "liberty" interest sufficient to invoke constitutional due process requirements requiring a hearing.

We would further respectfully submit that even if the circumstances of this case could be considered sufficient to invoke such constitutional due process requirements, petitioner here having been repeatedly notified of his problems, and conferred with by his principal and superintendent with respect thereto, over a period of over a year; and having been notified in advance of the superintendent's recommendation to the School Board and having been heard by the School Board before it affirmed the superintendent's recommendation, has clearly been treated with more fairness

and had the benefit of more due process than required by any of the applicable decisions of this Court or any other Court.

CONCLUSION

Petitioner has not been disturbed in his professional position as a teacher of General Science and is still so employed with all the rights and emoluments of any other teacher in Louisiana. There is no substantial Federal question and the decisions of the courts below are entirely consistent with this court's decisions, other decisions of the court below and other circuit courts and the law and policy of the State of Louisiana. Accordingly, the issue is not of a magnitude which would warrant this court's exercise of its certiorari jurisdiction.

Wherefore, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

JOHN F. WARD, JR.
Counsel for Respondent
770 North Street
Baton Rouge, La. 70802
(504) 387-0858

CERTIFICATE

I, John F. Ward, Jr., Attorney for Respondents, and a member of the Bar of the United States Supreme Court, do hereby certify that on this 10th day of September, 1975, I served copies of the foregoing Brief for Respondent In Opposition on the attorney of record for the petitioner herein, Mr. J. Minos Simon, by mailing three copies of same, postage prepaid, to him at his office at 1408 Pinhook Road, Post Office Box 52116, Lafayette, Louisiana, 70501.

JOHN F. WARD, JR.
Counsel for Respondent

EXHIBIT A

§441. Definitions.

As used in this Sub-part, the word "teacher" means any employee of any parish or city school board who holds a teacher's certificate and whose legal employment requires such teacher's certificate.

EXHIBIT B

July 8, 1963

Mr. Charles A. Badeaux, Chairman
Terrebonne Parish School Board
Personnel Committee
Post Office Box 1464
Houma, Louisiana

Dear Mr. Badeaux:

We received today your letter dated July 5, 1963, in which you present five questions for our consideration dealing with the tenure rights of a teacher, with particular reference to a coach.

We enclose herewith copy of an opinion of this office dated November 24, 1954, and another dated May 8, 1963, which, in part, is to the effect that the position of coach is not involved in the tenure law.

The status of this teacher, therefore, would be dependent upon his actual teaching rather than coaching, and, therefore, he may be relieved of his coaching duties without written charges, but unless he is actually demoted or his status is changed from a higher to a lower position as a teacher, he may be reassigned to a new position at the discretion of the School Board.

Sincerely yours,

CARROLL BUCK
First Assistant Attorney General

June 17, 1969

Mr. E. H. Flynn
Business Manager
St. Charles Parish School Board
Luling, Louisiana 70070

Dear Mr. Flynn:

We received your letter dated June 16, 1969, in which you request our opinion.

You state that by order of the federal court, effective for the 1969-70 school session, a school where a head coach has also been teaching will be converted from a senior high school to a junior high school, causing the coach to be transferred to the larger school where there is no opening for a head coach. This will result in a reduction in pay for the coaching implementation only, but his duties as a teacher will be the same.

This office has held that a football coach does not come within the meaning of the tenure statute. (See: Opinion of the Attorney General November 24, 1954).

Under the circumstances related by you, it is our opinion that this teacher has no ground to complain of his status under tenure as a teacher by removal to another school, particularly in view of the fact that this incidentally was an order of the federal court.

Sincerely yours,

CARROLL BUCK
First Assistant Attorney General

December 11, 1970

Football coach who was drafted by army is not entitled to be re-employed or reinstated to his former position as a coach does not come within tenure statutes.

Mr. James W. Comeaux
Assistant Superintendent
St. Martin Parish School Board
Post Office Box 230
St. Martinville, Louisiana 70582

Dear Mr. Comeaux:

Reference is made to your letter dated December 10, 1970 relative to a coach who was employed by the School Board for the 1970-71 school session but who was drafted by the army before he could begin his "teaching" assignment.

You wish to know whether this coach is entitled to be re-employed or reinstated in his former position or a similar position as coach.

This office has held that a football coach does not come within the tenure statutes, (see: opinion Attorney General, November 24, 1954), and therefore we know of no vested right in a coach to be returned to the same position.

Sincerely yours,

CARROLL BUCK
First Assistant Attorney General

EXHIBIT C

AFFIDAVIT OF HAROLD H. GAUTHE

On this 11th day of June, 1974, personally came and appeared, before me, the undersigned authority, duly authorized and qualified in and for the Parish of Lafayette, State of Louisiana,

HAROLD H. GAUTHE

a resident of the Parish of Lafayette, who, after being by me first duly sworn, did depose and say:

That he is the Superintendent of Schools for Lafayette Parish and that he makes this affidavit for use in that certain suit entitled "Allen G. Conque v. Harold Gauthe, et al," No. 74-166-L on the docket of the United States District Court, in opposition to plaintiff's motion for summary judgment filed therein and in support of a motion for summary judgment filed by defendants.

Allen G. Conque was assigned to Carencro High School for the 1971-1972 and 1972-1973 school years as a teacher of general science, a tenured position, and was assigned additional duties as an assistant coach, a non-tenured position. During the 1971-1972 school year the coaching situation at Carencro High School became unsatisfactory.

After various discussions of this situation with the principal of the school, Mr. Dugas, Mr. Conque and other coaches, a meeting was held at the school on February 21, 1972, to discuss these problems, which meeting was attended by myself, Principal Dugas, Mr.

Conque, other coaches and School Board Members, Mr. George F. Dupuis, Sr., Mr. Eddie Ackal, Mr. John Thibeau, Mr. Stanley P. Babin, Mr. Riolan Coussan, Mr. Preston Babineaux, Mr. Robert L. Browne, Mr. Earl Vallot, Mr. Jerome Bourque.

At that meeting it was determined that no coaching changes would be made at the time; but if the situation did not improve, the principal and I would make such recommendations as we considered necessary as shown by my letter to Principal Dugas of February 25, 1972, which is attached hereto and made a part hereof (Exhibit A).

The situation did not improve and on June 6, 1972, Principal Dugas wrote me recommending that Mr. Conque be transferred to another position in the Lafayette Parish Schools. This letter is also attached hereto and made a part hereof as Exhibit B. Thereafter, I personally held several hearings with Mr. Conque and Principal Dugas in an attempt to resolve the unsatisfactory coaching and athletic situation at Carencro High. However, the situation did not improve, and on June 1, 1973, Principal Dugas wrote me again recommending that Mr. Conque be transferred. That letter is attached hereto as Exhibit C.

I subsequently discussed this situation further with Mr. Conque at a hearing in my office but finally resolved that it was in the best interest of the school system and the coaching and athletic situation at Carencro High School that Mr. Conque be relieved of his coaching duties.

On June 22, 1973, I notified Mr. Conque by letter that based on the recommendations of the principal and ". . . my review of the testimony brought out at several hearings, . . ." that he was relieved of his duties as an assistant coach though remaining as a classroom teacher at Carencro High School effective July 1, 1973. A copy of this letter is attached hereto as Exhibit D. Copies of this letter were forwarded to the members of the Lafayette Parish School Board.

This reassignment of Mr. Conque's duties was included on a list of personnel changes presented to the School Board at its meeting of July 18, 1973. At that meeting I advised the Board of my recommendations as shown in the letter of June 22, 1973, and my personal knowledge of the coaching situation. My recommendation to the School Board that Mr. Conque be relieved of his coaching duties was not based upon the letter to me from Principal Dugas of June 1, 1973, but was based upon my own personal knowledge of the coaching and athletic situation at Carencro High over the past two (2) years and my several hearings with Mr. Conque, my belief being that relieving him of his coaching duties was in the best interest of the Lafayette Parish school system and the coaching and athletic situation at Carencro High School.

As Mr. Conque was not being dismissed or demoted as a teacher in the Lafayette Parish School System but merely having his duties reassigned, his reassignment was included on a list of personnel changes at the July 18, 1973 meeting. (See Exhibit E, page 3).

When the agenda item of personnel changes came up, Mr. Conque and a group of his friends and supporters were present at the Board meeting and Mr. Conque and several of his supporters were recognized and heard by the Board prior to its vote to approve "the recommended personnel changes" which motion was carried by a vote of twelve (12) to one (1) with one (1) member absent. (See Exhibit F, Page 4).

/s/ Harold H. Gauthe

Superintendent, Lafayette
Parish School Board

SWORN TO AND SUBSCRIBED before me this 11th day of June, 1974.

/s/ Earl A. Buller

Notary Public

Filed
June 17, 1974

AFFIDAVIT

On this 11th day of June, 1974, personally came and appeared before me, the undersigned authority, duly authorized and qualified in and for the Parish of Lafayette, State of Louisiana, GEORGE F. DUPUIS, SR., STANLEY P. BABIN, JEROME J. BOURQUE, AND EARL VALLOT, residents of the Parish of Lafayette, who, after being by me first duly sworn, did depose and say:

That each of them is a member of the Lafayette

Parish School Board and that they make this affidavit for use in that certain suit entitled "Allen G. Conque v. Harold Gauthe, et al," No. 74-166-L on the docket of the United States District Court, in opposition to plaintiff's motion for summary judgment filed therein and in support of a motion for summary judgment filed by defendants.

That each of them was a member of the Lafayette Parish School Board on July 18, 1973, when the Superintendent of Schools, Mr. Harold H. Gauthe, recommended that Mr. Allen G. Conque be relieved of his coaching duties at Carencro High School although being retained at Carencro High School as a classroom teacher. Their vote to sustain the Superintendent's recommendation to relieve Mr. Conque of his coaching duties was based upon Superintendent Gauthe's recommendation as contained in his letter of June 22, 1973, directed to Mr. Conque, copies thereof having been given to each affiant herein, their personal knowledge of the coaching and athletic situation and problems at Carencro High School over the past two years, such personal knowledge coming in part from a hearing held at Carencro High School on February 21, 1972, at which meeting Mr. Conque was present and spoke on his behalf; Mr. Dugas, the Principal, was present; Mr. Gauthe, the Superintendent, was present; as were each of affiants, and on affiants conclusion therefrom it was in the best interest of the Lafayette Parish School system and the athletic program at Carencro High School that Mr. Conque be retained at such school as a

classroom teacher without any coaching duties or responsibilities.

As Mr. Conque was not being dismissed or demoted as a teacher in the Lafayette Parish school system but merely having his duties reassigned, his reassignment was included on a list of personnel changes at the July 18, 1973, meeting which list included at least one other change relieving a teacher of his coaching duties. (See Exhibit E, Page 3)

When the agenda item of personnel changes came up, Mr. Conque and a group of his friends and supporters were present at the Board meeting and Mr. Conque and several of his supporters were recognized and heard by the Board prior to its vote to approve "the recommended personnel change" which motion was carried by a vote of twelve (12) to one (1) with one (1) member absent. (See Exhibit F, Page 4)

It was only after consideration of a Superintendent's recommendation as set forth above and a hearing from Mr. Conque and others that affiants concluded that it was in the best interest of the Lafayette Parish school system to reassign Mr. Conque's duties at the Carencro High School.

/s/ George F. Dupuis, Sr.

George F. Dupuis, Sr.,
President

/s/ Stanley P. Babin

Stanley P. Babin,
Board Member

/s/ Jerome J. Bourque

Jerome J. Bourque,
Board Member

/s/ Earl Vallot

Earl Vallot,
Board Member

SWORN TO AND SUBSCRIBED before me this 11th day of June, 1974.

/s/ Earl A. Buller

Notary Public

AFFIDAVIT

On this 11th day of June, 1974, personally came and appeared before me, the undersigned authority, duly authorized and qualified in and for the Parish of Lafayette, State of Louisiana, HERMAN C. CLAUSE, J. MAXIE BROUSSARD, DANIEL AUCOIN, DR. R. A. BARANCO, J. STEWART BONNET, JESSIE BOUDREAUX, JR., ALTON CHAISSON, DUDLEY LASTRAPES, JR., residents of the Parish of Lafayette, who, after being by me first duly sworn, did depose and say:

That each of them is a member of the Lafayette Parish School Board and that they make this affidavit for use in that certain suit entitled "Allen G. Conque v. Harold Gauthe, et al," No. 74-166-L on the docket of the United States District Court, in opposition to plaintiff's motion for summary judgment filed therein

and in support of a motion for summary judgment filed by defendants.

That each of them was a member of the Lafayette Parish School Board on July 18, 1973 when the Superintendent of Schools, Mr. Harold H. Gauthe, recommended that Mr. Allen G. Conque be relieved of his coaching duties at Carencro High School although being retained at Carencro High School as a classroom teacher. Their vote to sustain the Superintendent's recommendation to relieve Mr. Conque of his coaching duties was based upon Superintendent Gauthe's recommendation as contained in his letter of June 22, 1973, directed to Mr. Conque, copies thereof having been given to each affiant herein, and on affiants' conclusion that it was in the best interest of the Lafayette Parish school system and the athletic program at Carencro High School that Mr. Conque be retained at such school as a classroom teacher without any coaching duties or responsibilities.

As Mr. Conque was not being dismissed or demoted as a teacher in the Lafayette Parish school system but merely having his duties reassigned, his reassignment was included on a list of personnel changes at the July 18, 1973, meeting. (See Exhibit E, Page 3)

When the agenda item of personnel changes came up, Mr. Conque and a group of friends and supporters were present at the Board meeting and Mr. Conque and several of his supporters were recognized and heard by the Board prior to its vote to approve "the recommended personnel changes" which motion carried by a vote of twelve (12) to one (1) with one (1) member absent. (See Exhibit F, Page 4)

It was only after consideration of a Superintendent's recommendation as set forth above and a hearing from Mr. Conque and others that affiants concluded that it was in the best interest of the Lafayette Parish school system to reassign Mr. Conque's duties at the Carencro High School.

/s/ Herman C. Clause
Board Member

/s/ J. Maxie Broussard
Board Member

/s/ Daniel Aucoin
Board Member

/s/ Dr. R. A. Baranco
Board Member

/s/ J. Stewart Bonnet
Board Member

/s/ Jesse Boudreaux, Jr.
Board Member

/s/ Alton Chassion
Board Member

/s/ Dudley Lastrapes, Jr.
Board Member

SWORN TO AND SUBSCRIBED before me this 11th day of June, 1974.

/s/ Earl A. Buller
Notary Public

AFFIDAVIT

On this 11th day of June, 1974, personally came and appeared before me, the undersigned authority, duly authorized and qualified in and for the Parish of Lafayette, State of Louisiana, PRESTON J. BABINEAUX, resident of the Parish of Lafayette, who, after being by me first duly sworn, did depose and say:

That he is a member of the Lafayette Parish School Board and that he makes this affidavit for use in that certain suit entitled "Allen G. Conque v. Harold Gauthe, et al," No. 74-166-L on the docket of the United States District Court, in opposition to plaintiff's motion for summary judgment filed therein and in support of a motion for summary judgment filed by defendants.

That he was a member of the Lafayette Parish School Board on February 21, 1972, when a hearing was held at the Carencro High School concerning the problem with the coaching situation and athletic situation at Carencro High School involving particularly Mr. Allen G. Conque. This hearing was attended by Mr. Conque; the Principal, Mr. Allen Dugas; Mr. Gauthe, Superintendent of Schools; other coaches and several school board members.

I was also a member of the Lafayette Parish School Board on July 18, 1973, when the Superintendent of Schools, Mr. Gauthe, submitted a list of personnel changes which included the reassignment of Mr. Conque's duties so as to relieve him of coaching while retaining him as a teacher at Carencro High

School, as shown by a letter from Mr. Gauthe to Mr. Conque of June 22, 1973, a copy of which was furnished to the affiant. When the item of personnel changes came up on the agenda, Mr. Conque was present with a group of supporters and was heard from by the Board. Mr. Conque requested a hearing and the affiant asked him if he meant a formal tenure hearing at which his dismissal as a teacher in the Lafayette Parish School System could be considered and Mr. Conque answered in the affirmative. At this time a motion had already been made and seconded to approve recommended personnel changes including the reassignment of Mr. Conque's duties. Affiant then made a substitute motion that Mr. Conque be granted a hearing which would include consideration of his dismissal as a teacher in the Lafayette Parish School System. This motion died for a lack of a second. The vote was then taken on the above to approve the recommended personnel changes including reassignment of Mr. Conque's coaching duties and the affiant voted no.

/s/ Preston J. Babineaux

Board Member

SWORN TO AND SUBSCRIBED before me this 11th day of June, 1974.

/s/ Earl A. Buller

Notary Public